No. 86-794

Supreme Court, U.S.
FILED
NOV 17 1986
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE GARMENT DISTRICT, INC.,

Petitioner,

—v.—

BELK STORES SERVICES, INC., MATTHEWS-BELK COMPANY and JANTZEN, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the termination of a discounter by a manufacturer "unilateral" activity, and thus lawful under the *Monsanto* construction of Section 1 of the Sherman Act, where the *sole* reason for the termination of a discount store was that the manufacturer succumbed to the economic duress of a giant chain of full-price retailers whose *sole* motivation for forcing the termination was to eliminate price competition? The Fourth Circuit answered this question in the affirmative.

2. Where a 400 store chain, motivated *solely* by the desire to suppress price competition, threatens a supplier with the total loss of its business, and thereby induces such supplier to terminate a single store discounter, does such termination constitute price fixing under the Sherman Act? The Fourth Circuit answered this question in the negative.

3. Where the *sole* purpose and inevitable effect of a coerced agreement to eliminate a competitor is to suppress price competition, is such action lawful under the Sherman Act simply because the conspirators failed to agree upon specific resale prices for an entire line of merchandise? The Fourth Circuit answered this question in the affirmative.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, The Garment District, Inc., respectfully prays that a writ of certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 26, 1986.

OPINION BELOW

The opinion of the Court of Appeals is reported at 799 F.2d 905 and appears in the Appendix hereto.

JURISDICTION

The decision and judgment of the court of appeals was entered on August 26, 1986, and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. Section 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal. . . .

STATEMENT

In the Fall of 1981, petitioner, The Garment District, Inc. ("The Garment District") opened a store in Gastonia, North Carolina. (799 F.2d at 906; Appendix at 3a) A major line of merchandise carried by The Garment District was supplied by respondent Jantzen, Inc. ("Jantzen"), a branded line of apparel. (*Id.*) The Garment District consistently priced Jantzen and other merchandise at a thirty (30%) to thirty-five (35%) percent mark-up, whereas the other two stores in Gastonia which carried Jantzen were full-price merchants, employing the universal department store one hundred (100%) percent or "keystone" mark-up, which is the "retail industry's practice" by full-price merchants. (*Id.*) One such full-priced retailer was respondent Matthews-Belk Company which is a part of the Belk chain of four hundred (400) department store retailers in the Southeast, including approximately two hundred (200) which purchased Jantzen products (*Id.*). Respondent Belk Stores Services, Inc. in Charlotte, North Carolina "provides

purchasing assistance" to the Belk chain. (*Id.*) (Following the Fourth Circuit's approach, the two Belk defendants will be referred to collectively herein as "Belk".)

"*Soon after The Garment District opened, Belk pressured Jantzen to stop supplying the store by threatening Jantzen with the loss of all Belk business.*" (799 F.2d at 907; 3a emphasis added). Jantzen immediately succumbed to such economic duress and promptly terminated The Garment District and "*notified Belk of Jantzen's decision to terminate The Garment District in a letter dated January 1, 1982.*" (*Id.*; 4a emphasis added. The text of this "smoking gun" letter is recited in full at footnote 1 of the decision.) That respondents knew they were violating the law when they agreed to terminate The Garment District is unequivocally revealed by the fact that, on instructions from a high executive of Belk, Belk destroyed its copies of the letter and instructed Jantzen to do the same (*Id.*). All copies were destroyed except one, which was retained by former Jantzen salesman Jay Crippen (*Id.*) All sales by Jantzen to The Garment District were terminated promptly following the writing of this letter.[1]

Although Jantzen and the Belk defendants offered various purportedly innocent explanations for the cut-off, the Fourth Circuit rejected all such argumentation as mere pretext. ("*In fact, the relationship terminated because of the pressure exerted by Belk.*" *Id.* at 907; 3a-4a (emphasis added)) Reviewing the evidence on an appeal from a directed verdict, the Fourth Circuit found that *Jantzen's reason for terminating sales to The Garment District was based solely on its acquiescense in Belk Stores' threats to cease doing business with Jantzen and that the Belk defendants' only motivation for making such threats was to eliminate The Garment District's price competition:*

> "*Belk brought pressure against Jantzen in order to eliminate a discount competitor. Jantzen, weighing the advan-*

---

1 Other instances of Belk's economic duress directed at Jantzen (*e.g.*, its exclusion of Jantzen from its trade shows and the "coerced" termination of another discounter in Charlotte) are set forth at 799 F.2d 907; 3a.

tages of selling to 200 Belk stores against selling to The Garment District, opted to drop The Garment District."

799 F.2d at 908; 7a (emphasis added)

Nevertheless, incredibly, the Fourth Circuit found insufficient evidence to present a jury question as to whether Jantzen and the Belk defendants conspired to adversely affect price competition in *per se* violation of the Sherman Act.

The Fourth Circuit's rationale appears to be based upon its interpretation of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and its own earlier decision in *National Marine Electronics Distributors, Inc. v. Raytheon Company*, 778 F.2d 190 (4th Cir. 1985). (A case for which a writ of certiorari was not sought.)

At the heart of the Fourth Circuit's reasoning is its *fiat* conclusion that Jantzen acted "unilaterally" within the meaning of *Monsanto* when it decided to give in to the economic duress of Belk. In finding this coerced activity to be "unilateral", the Court simpy failed to address the fundamental principle of antitrust law that a conspiracy may be the product of coercion and certainly need not be voluntary. (*E.g.*, *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Albrecht v. Herald & Co.*, 390 U.S. 145 (1968) and other cases cited *infra*.)

To bolster its decision, it relied on its own unreviewed opinion in *Raytheon*, where it was held that commercial threats, duress and coercion are "mere complaints" under the *Monsanto* doctrine. Indeed, it is instinct in the Fourth Circuit's opinion that *the greater the anticompetitive pressure applied, the less likely that the termination offends the antitrust laws.* (*See* its distinction of *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469 (3d Cir. 1985) 799 F.2d at 910; 10a-11a.)

Another apparent *rationale* for exonerating the defendants (whose destruction of evidence the Fourth Circuit said "cannot be condoned" 799 F.2d at 911; 11a) was its curious notion that vertical price fixing can only occur if the conspirators agree to

charge specific prices, despite the undisputed fact that the purpose and inevitable effect of the agreement was to stifle price competition. Needless to say, the Fourth Circuit cited no authority for this proposition other than its own unreviewed decision in *Raytheon*. It made no mention of the abundant Supreme Court authority squarely holding that an agreement which has the purpose or effect of suppressing price competition is a *per se* violation, irrespective of whether specific prices are agreed upon. (*E.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) and other cases cited below.)

As is shown below, this extraordinary result is in direct conflict with settled decisions of the United States Supreme Court, a specific resolution recently passed by Congress interpreting the antitrust laws and holdings of numerous other circuit and district courts. (At footnote 3 of the opinion, the Fourth Circuit acknowledges the conflict between its decision and at least some other circuit and district courts. 799 F.2d at 909; 8a)

However, before analyzing the extent to which this decision flies in the face of settled law, the consequences of leaving it undisturbed cannot pass without comment. So long as this case remains law in the Fourth Circuit, any powerful merchant in the Southeast can eliminate price competition by the most blatant and unabashed acts of economic duress and the more high-handed its tactics, the more likely it is to escape liability under the antitrust laws. William T. Lifland, a leading commentator upon antitrust law, found the instant case so at odds with the purposes of the Sherman Act that he devoted the following comment specifically to the instant case:

> "The decision [of the Fourth Circuit in *The Garment District* case]—applying the Supreme Court's 1984 *Monsanto* decision to permit a retailer to insist on termination of a price-cutting rival—is one of a series of decisions raising the question whether the *Monsanto* rule as so applied will lead to the demise of discount operations. It may be time for courts to consider more closely whether

the application of the rule without some qualification is consistent with the underlying purpose of the law."

New York Law Journal, Oct. 17, 1986 at p. 2, col. 4.

REASONS FOR GRANTING THE PETITION

This Petition involves two vital issues of Federal Antitrust Law: (1) Whether a conspiracy or agreement, violative of Section 1 of the Sherman Act occurs where the Court finds that one of the alleged co-conspirators took anticompetitive action under economic duress by its alleged co-conspirators; and (2) Whether an agreement to terminate the only consistent discounter in a market, where the sole motivation of one of the parties seeking termination is to eliminate price competition, is a price-fixing conspiracy in *per se* violation of Section 1. Notwithstanding the Fourth Circuit's apparent view, this Court and other circuits have held on numerous occasions that an antitrust conspiracy exists even though it is the product of coercion or economic duress. Secondly, this Court and other circuit courts have consistently held that it is unnecessary for antitrust conspirators to agree to any specific price, so long as the purpose or effect of the contract, combination or conspiracy was to adversely affect price competition. Wherever such conduct has occurred, this Court has condemned such activity as a *per se* violation of the antitrust laws.

From virtually the beginning of antitrust jurisprudence, it has been held that a conspiracy can come into existence through the exercise of coercion or economic duress. As early as 1914, this Court, in *Eastern States Retail Ass'n v. United States*, 234 U.S. 600 (1914), held that an antitrust conspirator need not be acting voluntarily and will be deemed a member of an antitrust conspiracy, even if economic coercion causes such a party to join the conspiracy. This principle has been consistently applied by this Court in the numerous cases referred to below. Accordingly, the Fourth Circuit's notion that Jantzen acted "unilaterally" because it was involuntarily succumbing to

Belk's pressure contravenes settled law as well as common sense.

Likewise, whenever this Court has been faced with the question, it has held that where the purpose or foreseeable result of an agreement, whether vertical or horizontal, and however disguised, results in an adverse effect upon price competition, a *per se* violation of the antitrust laws is presented. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). Thus, the Fourth Circuit's apparent belief that Jantzen and Belk had to sit down (presumably with price lists in their hands) and agree upon specific resale prices is directly at odds with the decisions of this Court and other federal forums.

The Fourth Circuit apparently viewed the *Monsanto* case as overruling *sub silentio* all of this Court's decisions holding that, for anti-trust purposes, coerced activity is conspiratorial as well as the enormous body of case law for the proposition that a *per se* violation is presented where agreed-upon activity causes or is intended to cause the stifling of price competition. Of course, *Monsanto* provides no authority for either proposition. *Monsanto* merely holds that the termination of a discounter followed by "mere complaints" about pricing does not present a jury question as to the existence of a price-fixing agreement unless the plaintiff offers proof tending to show the absence of unilateral activity.

Nothing in *Monsanto* indicates that this Court has tacitly overruled its own numerous decisions. To the contrary, it is plainly implicit in *Monsanto* that where economic pressure going beyond "mere complaints" causes a discounter to be terminated and all assertions of unilateral action are disproven, a price-fixing agreement will be found.

In this case, the *Monsanto* evidentiary standard was more than satisfied. As the Fourth Circuit found, Belk's communications to Jantzen were not "mere complaints". In the Fourth Circuit's own language, the communications were threats, pressure and coercion. By the same token, the Fourth Circuit

rejected all pretext by defendants that Jantzen was not acting at the behest of Belk. Thus, on the record, The Garment District overwhelmingly fulfilled its burden under *Monsanto*: it not only proved that Jantzen terminated The Garment District solely because of Belk's pressure, it established that all of Jantzen's assertions of unilateral activity were pretextural and the Fourth Circuit so found.

Thus, if there were no decision from this Court relating to the issues in this case other than *Monsanto* itself, the Fourth Circuit should have found that a *per se* violation of the antitrust laws had occurred: The Garment District proved economic duress, not "mere complaints"; The Garment District proved that the duress caused the termination and entirely refuted all suggestions of unilateral activity. Thus, the *Monsanto* case itself compels reversal.

Finally, to the extent that the Fourth Circuit's determination is grounded on the belief that price fixing requires specific agreement as to prices, it is directly contradicted by Act of Congress. With respect to some antitrust issues, Congressional understanding of the application of the Sherman Act may be difficult to ascertain because of the passage of time and the lack of legislative history concerning the subject in question. Here, there is no such impediment to ascertaining Congress's interpretation of the Act. By a recent enactment of Congress, signed by the President in December, 1985 (*see*, Pub. L. No. 99-180 at Section 605, 99 Stat. 1136, 1169-70 (December 13, 1985)), any question as to whether Congress believes that specific agreement as to specific prices is requisite to the finding of a price-fixing agreement has been laid to rest.

In a resolution, ultimately signed into law, Congress rejected the proposed "Vertical Restraint Guidelines" of the Antitrust Division of the Justice Department, because, *inter alia*, the proposed Guidelines would have required "explicit agreement as to the specific prices" to be charged in a vertical price-fixing agreement. As stated by Congress, such aspects of the Guidelines "are not an accurate expression of the Federal antitrust

laws or Congressional intent with regard to the application of such laws to resale price maintenance . . ." (99 Stat. at 1169-70) Thus, the Fourth Circuit's opinion not only conflicts with numerous time-honored decisions of this Court, it contravenes Congress's own most recent interpretation of the Sherman Act.

Unless and until this Court corrects the Fourth Circuit's misapprehension as to the purpose and effect of the antitrust laws, competition in the Southeast will be governed by the long discredited principle of "Might Makes Right". Any powerful business entity in that circuit which wishes to dispense with the inconvenience of price competition may now insist upon the termination of all discounters in its trade area with impunity. With all due respect to the Fourth Circuit, its endorsement of the law of the jungle in the marketplace betrays a fundamental misunderstanding of the purpose and effect of the Sherman Act, as written and as interpreted by Congress and the judiciary.

I. DECISIONS OF THIS COURT FIRMLY ESTABLISH THAT A CONSPIRACY IN VIOLATION OF THE ANTITRUST LAWS OCCURS WHERE A PARTY'S CONDUCT RESULTS FROM ANOTHER'S COERCION

In holding that Jantzen's submission to Belk's economic duress was "unilateral" activity, the Fourth Circuit said nothing about the massive body of case law which stands for the proposition that succumbing to economic coercion (however reluctantly) results in an agreement or conspiracy in violation of Section 1 of the Sherman Act. *See, e.g., Eastern States Retail Lumber Ass'n v. United States*, 234 U.S. 600 (1914); *United States v. Paramount Pictures, Inc.* 334 U.S. 131 (1948); *Simpson v. Union Oil Co.*, 377 U.S. 13, 17 (1964) ("A supplier may not use coercion on its retail outlets to achieve resale price maintenance."); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

In the instant case, the respondents did not even contend that Jantzen's activity would be "unilateral" if, as the Fourth Circuit found, it resulted solely from the brass-knuckled persuasion of Belk. (Instead, all defendants were content to rely upon purported distributional argumentation which the Fourth Circuit correctly dismissed as mere "pretext".) Thus, the Fourth Circuit's view that the termination in question was "unilateral", appears to be bottomed on its notion that a contract or conspiracy under Section 1 cannot exist unless all parties to the conspiracy are happy to join it and share the same goals. Needless to say, the Fourth Circuit did not discuss any of the above-cited case law or refer to any authority to the contrary, with the exception of its own unreviewed decision in *Raytheon*.

As early as the case of *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), this Court was already *restating* the essential principle of antitrust laws that conspiracies occur when a party is unwillingly forced to restrain trade by another:

> "Section 1 of the Act, . . . *is not confined to voluntary restraints*, as where persons engaged in interstate commerce agree to suppress competition among themselves, *but includes as well involuntary restraints*, as where persons not so engaged conspire to *compel* action by others . . ." quoting *United States v. Patten*, 226 U.S. 525 (1912)
>
> (emphasis added)

The Court went on to state that Section 1 of the Sherman Act is offended "whether the restraint be occasioned by unlawful contracts . . . boycotts, coercion, threats, intimidation . . ." *Id.*, quoting *Loewe v. Lawlor*, 208 U.S. 274 (1908).

This Court has never retreated from this view and, indeed, has had frequent occasion to reconfirm it. For example, in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), the Court stated:

> "There is some suggestion . . . that large exhibitors with whom defendants dealt fathered the illegal practices and forced them on the defendants. But, as the District Court observed, that circumstance, if true, does not help defendants. *For acquiescense in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.*"
>
> (emphasis added)

Likewise, in *Simpson v. Union Oil Co.*, 377 U.S. 13, 17 (1964), this Court stated:

> "We made clear in *United States v. Parke, Davis & Co.*, 362 U.S. 29 that a supplier may not use coercion on its retail outlets to achieve retail price maintenance. We reiterate that view, adding that it matters not what the coercive device is."

Nothing in *Monsanto* or any other case so much as suggests that this Court has retreated one inch from its oft-restated view that coerced agreements are conspiracies in violation of the antitrust laws. Indeed, *Monsanto* may fairly be read as a further reconfirmation of the principle. *Monsanto* simply held that a price-fixing conspiracy may not be inferred from a sequence of "mere complaints", the termination of a discounter and the discounter's failure to present evidence tending to exclude the possibility of unilateral action. Plainly implicit in this evidentiary standard is the notion that coercion which goes far beyond "mere complaints" and which in fact causes the termination of a discounter is a price-fixing conspiracy especially where, as here, all assertions of unilateral behavior are proven to be pretextural.

That the Fourth Circuit deemed Jantzen's compelled termination of The Garment District to be a "unilateral" act despite such a plethora of Supreme Court authority to the contrary may be explained by the fact that learned counsel for the defendants did not even argue that a coerced termination is "unilateral" activity under Section 1. Defendants knew that The Garment District had proven its case if the evidence

showed what the Fourth Circuit found, *i.e.*, that the termination was caused by Belk's anticompetitive pressure. Defendants therefore confined their argumentation to attempts to explain away Jantzen's activity on a variety of excuses, all of which were found to be sham. Defendants' counsel were far too familiar with the antitrust laws to even raise the argument that Jantzen could have acted unilaterally if it were merely knuckling under to Belk's coercion.

Thus, unless this Court overturns the Fourth Circuit's decision, any powerful business entity in that circuit can eliminate price competition by threatening suppliers who deal with discounters. Even where the supplier's agreement to succumb to such coercion is recited in a writing and even where the malefactors conspire to destroy the evidence, no risk of antitrust liability attaches in the Fourth Circuit. It is respectfully submitted that this Court should take the opportunity to reinstate Section 1 of the Sherman Act in the Fourth Circuit and reverse that Court's determination on the basis of the long-established principles discussed above.

2. DECISIONS OF THIS COURT FIRMLY ESTABLISH THAT AN AGREEMENT TO ELIMINATE PRICE COMPETITION CONSTITUTES UNLAWFUL PRICE FIXING

The Fourth Circuit's view that explicit agreement as to specific prices is requisite to illegal price-fixing conflicts with decisions of this Court. Long ago, this Court broadly defined illegal price fixing as "a combination formed for the purpose or with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity. . . . " *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). As more recently stated by the Court: "Price is the 'central nervous system of the economy.' . . . and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face. . . ." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

This Court never before required proof of an agreement to set prices at any particular levels to constitute price fixing. Indeed, in *Socony-Vacuum*, this Court held that the offense of price-fixing does not entail prices "fixed in the sense that they were uniform and inflexible. Price-Fixing . . . has no such limited meaning." 310 U.S. at 222. Applying this long established concept, this Court recently held that an agreement to eliminate credit terms was "tantamount to an *agreement to eliminate discounting*, and thus [fell] squarely within the traditional *per se* rule against price fixing." *Catalano, Inc. v. Target Sales Inc.*, 446 U.S. 643, 648 (1980) (emphasis added). In *Catalano*, the Court said:

> In . . . *Socony-Vacuum* . . . we held that a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful without any inquiry into the reasonableness of the program, *even though there was no direct agreement on the actual prices to be maintained* . . . .
>
> *Id.* at 647 (emphasis added)

The Court further noted that the agreement at issue was "merely one form of price fixing." *Id.* at 650.

Similarly, this Court's decision in *United States v. General Motors Corp.*, 384 U.S. 127, 145-48 (1966), squarely rejected the notion that an agreement to eliminate discounters was somehow less pernicious that a direct agreement to fix prices. Holding that a conspiracy to eliminate discounters was a *per se* violation of the Sherman Act, the Court reasoned:

> The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

Even though the above cases dealt with horizontal price-fixing conspiracies, their holdings are not limited to the horizontal context. In condemning vertical price restraints, this Court has often cited the same broad description of price fixing set out in *Socony*. *See, e.g., Simpson v. Union Oil Co.*, 377 U.S. 13, 18 (1964); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 47 (1960). Logically, and in fact, an agreement intended to eliminate discounting amounts to price fixing by this definition whether it is vertical or horizontal in nature.

In this regard, the Court held in *Parke, Davis* that direct agreement on resale prices is not a required element of unlawful price fixing. There, a manufacturer refused to deal with wholesalers who charged less than suggested resale prices and enlisted the cooperation of wholesalers in cutting off offending retailers. Even though there was no direct agreement on price, the Court held that the scheme constituted illegal price fixing. The Court said: "[A]n unlawful combination is *not* just such as arises from a price maintenance *agreement*, express or implied; such a combination is *also* organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." 362 U.S. at 43 (emphasis added in part.)

The agreement between Jantzen and the Belk defendants, although vertical in nature, stifled horizontal competition in both purpose and effect. Faced with price competition on the horizontal level, Belk forced Jantzen to accomplish the same purpose and result by vertical conspiracy. (The economic and legal effect would be no different if Belk had procured The Garment District's horizontal agreement to price at keystone.) As stated in *General Motors*, the courts should not close their eyes to "the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders." 384 U.S. at 148. Whether in the vertical context or the horizontal context, it would not make sense "to construe the Sherman Act to prohibit conspiracies to fix prices at which

competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." *Id.*

Even if the agreement between Jantzen and Belk did not directly "fix" prices at a particular level, it was clearly intended to destroy price competition in a most effective way— removal of a competitor *because* he refused to conform with the keystone mark-up (which coincided with Jantzen's suggested retail prices 799 F.2d at 907; 3a). Unquestionably, this conspiracy to eliminate price competition, in the words of this Court, "falls squarely within the traditional *per se* rule against price fixing" and is "merely a form of price fixing." 446 U.S. at 648, 650.

3. IN DIRECT CONFLICT WITH THE DECISION BELOW, AT LEAST THREE OTHER COURTS OF APPEALS HAVE HELD THAT PRICE FIXING OCCURS WHEN A SUPPLIER TERMINATES A DEALER PURSUANT TO THE REQUEST OR COERCION OF A FULL PRICE COMPETITOR

The Fourth Circuit acknowledged that its holding in this case directly conflicts with the holdings of another circuit court of appeals and two district courts. (In footnote 3 of the opinion, the court of appeals declined to follow *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979) as well as two district court cases. 799 F.2d 909; 8a)

Indeed, until recently, every other federal court to consider this question has held that unlawful price fixing occurs when a supplier terminates a dealer pursuant to a conspiracy with a competing dealer to eliminate price competition, precisely the conduct exonerated by the Fourth Circuit's *ipse dixit*. *See Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466 (8th Cir. 1985); *Ziddell Exploration, Inc. v. Conval International, Ltd.*, 719 F.2d 1465, 1469 (9th Cir. 1983); *But, See Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212 (5th Cir. 1985); *McCabe's Furniture, Inc. v. La-Z-Boy*, 798 F.2d 323 (8th Cir. 1986).

The Ninth Circuit's holding in *Ziddell* vividly illustrates this conflict:

> [I]f a manufacturer withdraws its product from a price-cutting distributor at the request of a competing distributor as part of a conspiracy to protect the requesting distributor from price competition, the manufacturer has committed a *per se* violation of the antitrust laws.
>
> 719 F.2d at 1469.

Likewise, the Third Circuit held in *Cernuto*, *supra*, that the termination of a discounter at the request of a full price competitor is a price-fixing agreement in *per se* violation of the Sherman Act. The Fourth Circuit explicitly stated that its decision in the instant case is in direct conflict with *Cernuto* and other cases. (799 F.2d at 909; 8a note 3.)

The impact of this conflict is substantial, encompassing all businesses operating in or substantially affecting interstate commerce and subject to the Sherman Act. Uniform interpretation of the issue of law involved—the standard of liability for unlawful price fixing—clearly is vital to efficient business planning at all levels of the chain of distribution. There can be no justification for deciding claims of unlawful price fixing based upon standards of liability which materially differ depending upon the geography of the place of suit.

4. THE DECISION BELOW CONTRAVENES CONGRESSIONAL INTENT

Congress recently passed legislation that implicitly rejects the holding below. See Pub. L. 99-180 at Sec. 605, 99 Stat. 1136, 1169-70 (Dec. 13 1985). As a prelude to this legislation, the House of Representatives issued House Report 99-399 on November 21, 1985. H.R. 99-399 strongly criticizes the so-called "Vertical Restraints Guidelines" published by the Department of Justice in January 1985. The Report says in part:

> Other "restatements" of the law exist in the Guidelines that attempt to dilute or trivialize the generality of the *per se* rule against price fixing, both horizontal and vertical. *The Division claims*, again without accompanying authorities, *that vertical price fixing is lawful so long as the agreement to fix prices does not set "specific" resale prices* and is ancillary to one or more non-price restraints. . . . Such a statement appears to reject or ignore any consideration of the effects of a restraint on price in determining whether there is a price fixing agreement.

* * * * * *

"In all these respects, the Guidelines are *inconsistent with existing law* and are also demonstrably *unsound as a matter of policy.*" (Emphasis added). This Report led to a Congressional enactment of Sec. 605 of Pub. L. 99-180 which reads in pertinent part:

> Where such ["Vertical Restraint Guidelines" published by the Justice Department] are inconsistent with established antitrust law . . . in stating that vertical restraints that have an impact upon prices are subject to the *per se* rule of illegality only if there is an 'explicit agreement as to the specific prices' . . . .;
>
> . . . . Now, therefore, be it
>
> *Resolved*, That it is the sense of the Congress that the antitrust enforcement policy guidelines stated in "Vertical Restraints Guidelines" . . .
>
> > are *not an accurate expression of the Federal antitrust laws or congressional intent with regard to the application of such laws to resale price maintenance* . . . .

99 Stat. at 1169-70 (emphasis added in part).

This statement of Congressional intent pinpoints a critical flaw in the decision below: the notion that the *per se* rule against price fixing narrowly applies only to direct agreements on resale price levels. The Congress recognized that, in substance, both concerted elimination of price cutting and direct agreement on price are forms of price fixing having the same illicit purpose and effect.

CONCLUSION

This Court and Congress have consistently condemned price-fixing as a *per se* violation of the antitrust laws, whether or not such price-fixing results from coercion and/or agreements that specify the prices to be fixed. The elimination of The Garment District was pursuant to a price-fixing agreement under every relevant interpretation of the Sherman Act by this Court and Congress.

Accordingly, a writ of certiorari should be issued to review this patently erroneous holding.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-2362

THE GARMENT DISTRICT, INC.,

Appellant,

—versus—

BELK STORES SERVICES, INC.; MATHEWS-BELK COMPANY; JANTZEN, INC.,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, Chief Judge. (CA 84-543)

Argued: April 10, 1986 Decided: August 26, 1986

Before:

RUSSELL and ERVIN, *Circuit Judges*, and BUTZNER, *Senior Circuit Judge*.

HERBERT S. KASSNER (Stacy J. Haigney; Kassner & Haigney; C. Michael Wilson; Gerdes, Mason, Brunson, Wilson & Tolbert on brief) *for Appellant*;

A. WARD MCKEITHEN (Everett J. Bowman; Robinson, Bradshaw & Hinson, P.A., on brief) *for Appellee Jantzen, Inc.*, BENNE C. HUTSON (E. Osborne Ayscue, Jr.; Smith, Helms, Mulliss & Moore on brief) *for Appellees Belk Stores Services, Inc., and Matthews-Belk Company.*

BUTZNER, *Senior Circuit Judge*:

The Garment District, Inc., appeals a judgment of the district court in favor of Belk Stores Services, Inc., Mathews-Belk Co. (collectively Belk), and Jantzen, Inc., entered on a motion for a directed verdict. The Garment District claims that Belk coerced Jantzen into agreeing to terminate sales to the Garment District in furtherance of a price maintenance scheme in violation of section 1 of the Sherman Act. 15 U.S.C. § 1 (1982). We affirm because the Garment District's evidence is insufficient to permit the inference that Belk and Jantzen acted in concert to set or maintain retail prices. *See* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 760-64 (1984).

The district court's entry of judgment on a directed verdict at the close of the Garment District's case requires us to view the evidence most favorably to the Garment District and to give it the benefit of all reasonable inferences that can be drawn from the evidence. We cannot weigh the evidence or pass on the credibility of witnesses, for these are functions reserved for the jury. The evidence must disclose that the Garment District cannot prevail as a matter of law. *See* Fed. R. Civ. P. 50(a); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971).

I

The Garment District was located in Gastonia, North Carolina, and sold clothes at discount prices. One of its competitors in Gastonia was Mathews-Belk, a member of the Belk department store chain. Belk Stores Services provides purchasing assistance to the Belk chain. There are over 400 Belk stores throughout southeastern United States. Approximately 200 of these stores sell Jantzen clothing.

The Garment District opened in the fall of 1981 and carried a full line of Jantzen clothing. Jay Crippen, who worked as Jantzen's sales representative in the Gastonia area, owned an interest in the store in violation of Jantzen's policy against self-dealing by its employees. Jantzen and Belk did not learn of Crippen's proprietary interest until after Jantzen terminated its relationship with the Garment District.

Mathews-Belk and Ivey's, another Gastonia retailer, also carried a full line of Jantzen clothing. They followed the retail industry's practice of selling clothing at a 100% markup, commonly known as the keystone price. Jantzen's suggested retail price was the keystone price. The Garment District sold Jantzen clothing at a 30-35% markup. It was the only consistent discounter of Jantzen clothing in Gastonia.

Soon after the Garment District opened, Belk pressured Jantzen to stop supplying the store by threatening Jantzen with the loss of all of Belk's business. Jantzen was not permitted to attend Belk's annual trade show. In addition, Mathews-Belk placed its Jantzen clothing in the budget basement and sold it at discount prices. In January 1982, Belk officers met with Crippen and John Jenkins, the regional manager for Jantzen, to discuss the situation in Gastonia. The Belk officers complained of sales to the Garment District, referring to it as the discount store. After the meetings, Crippen and Jenkins visited the Garment District at which time Jenkins decided to terminate Jantzen's relationship.

Jenkins instructed Crippen to terminate the Garment District on the pretext that the store did not present a suitable image for a Jantzen retailer. In fact, the relationship was terminated

because of the pressure exerted by Belk. Jenkins notified Belk of Jantzen's decision to terminate the Garment District in a letter dated January 18, 1982.[1] A Belk officer later requested that all copies of the letter be destroyed out of concern for its legal implications. Crippen, however, did not destroy his copy.

Belk also coerced Jantzen into terminating its sales to the Burlington Coat Factory Warehouse, a discount store located in Charlotte, North Carolina, by again threatening Jantzen with the loss of all of Belk's business. Belk successfully pressured Puritan Sportswear into halting its sales to the Garment District. Jantzen did not participate in this incident. Jantzen continued to deal with the World of Clothing, a discount store in Hendersonville, North Carolina, which sold a large volume of Jantzen's products.

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1. Mr. Bob Smith
G.M.M. Men's & Boy's Wear
Belk Stores Services, Inc.
308 East Fifth Street
Charlotte, North Carolina 28231

Dear Bob:

I wanted to inform you on what has taken place regarding our problems in your Gastonia trade area.

On January 11, 1982 I had an appointment with Mr. Matthews of the Gastonia store. We had a very open discussion in which we were both able to air out our positions as to the problems we both face in his market area.

I was made aware by Mr. Matthews of the past and present problems and assured him of Jantzen's desire to solve these problems at once.

Bob, I must say that I was surprised by the situation that exists in Gastonia. I will also say that this situation should not exist and that we, at Jantzen, will make every effort to see that it is rectified.

Jantzen's area of distribution has not changed and Jantzen has no plan to change it in the future. Jantzen is very appreciative of its business with Belk's and we will continue to offer Belk's the finest goods and service that is available to our industry.

In closing let me say again that the situation that exists in Gastonia is a mistake on our part and that we intend to rectify this situation.

Thank you for bringing this problem to my attention.

Kindest regards,

John Jenkins

The district court granted the defendants' motions for a directed verdict at the close of the Garment District's evidence. The court ruled:

> The Plaintiff produced no evidence that there was any agreement or "conspiracy" between Jantzen and Belk to maintain resale prices. A conspiracy to maintain resale prices simply was not established by proof that the Defendant manufacturer terminated the Plaintiff following or even in response to, complaints or threats by the Defendant Belk.[2]

II

Concerted action by a manufacturer and its retailers to set or maintain the manufacturer's retail prices violates section 1 of the Sherman Act. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). Nevertheless, the manufacturer, acting independently, may announce a price and terminate those retailers who fail to adhere to it. United States v. Colgate & Co., 250 U.S. 300 (1919). A manufacturer's termination of a discounting distributor, in response to complaints from other distributors, is insufficient by itself to prove an illegal price-fixing conspiracy. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 760-64 (1984); *see also* Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1363 n.1 (1986) (White, J., dissenting).

In *Monsanto*, the Court explained that "[p]ermitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct." 465 U.S. at 763. Therefore, barring "a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market." 465 U.S. at 764. Accord-

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2. We find it unnecessary to address the district court's other ground, failure to prove damages, for directing a verdict against the Garment District.

ingly, the Court held that to create an inference of conspiracy, "something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 465 U.S. at 764. "[T]here must be direct or circumstantial evidence . . . that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." 465 U.S. at 768. Conduct that is as "consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 106 S. Ct. at 1357.

This court applied *Monsanto* in National Marine Electronic Distributors, Inc. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1985). Raytheon terminated its relationship with National after receiving complaints from other dealers who were being undersold. Some of these complaints "rose to the level of threats that the dealers would cease doing business with Raytheon if the relationship with National was not terminated." *Raytheon*, 778 F.2d at 192. These threats influenced Raytheon's decision to terminate National. *See* 778 F.2d at 192.

We affirmed a directed verdict for Raytheon because of the "lack of evidence that reasonably tends to prove that Raytheon and the complaining dealers schemed to terminate National for the purpose of restraining price competition." 778 F.2d at 192-93. We noted that Raytheon did not dictate to its dealers the prices at which they sold. Instead, "[t]he dealers set their own retail prices . . . . Raytheon's dealers competed with each other and with dealers who sold competing brands of similar products. This evidence refutes the charge that Raytheon conspired with one or more dealers to terminate National for the purpose of restraining price competition." 778 F.2d at 193. We held that National's claim was barred because there was no evidence of an agreement to maintain prices.

III

Jantzen did not set retail prices. Crippen, testifying on behalf of the Garment District, said that although Jantzen suggested retail prices, each merchant was free to set its own price. Ivey's, Mathews-Belk, and the World of Clothing sold at different prices without interference from Jantzen.

Belk and Jantzen pursued different goals. Belk brought pressure against Jantzen in order to eliminate a discount competitor. Jantzen, weighing the advantages of selling to 200 Belk stores against selling to the Garment District, opted to drop the Garment District. Although Jantzen responded favorably to Belk's complaints about the Garment District, it did not enter into any agreement with Belk to fix or maintain retail prices. Belk and its neighboring competitor, Ivey's, remained free to set their own prices. Consequently, the Garment District's claim fails unless *Monsanto* and *Raytheon* can be distinguished.

IV

The Garment District's principal argument for distinguishing *Monsanto* and *Raytheon* is that in those cases the dealers merely complained about competing discounters whereas the conduct of Belk rose to the level of "economic duress, coercion and threats." The Garment District seeks to draw a distinction between the complaints of small, independent dealers and the coordinated pressure that was exerted by Belk who threatened Jantzen with the loss of business of approximately 200 Belk stores.

We reject this argument. In *Raytheon*, the dealers not only complained that they were being undersold, they also threatened to terminate their business with Raytheon. Moreover, an effort was made by some of the dealers to coordinate their threats to exert additional pressure on Raytheon.

The only distinction between this case and *Raytheon* is that Belk was able to exert greater pressure because it represented 200 stores. This distinction does not alter our analysis. *Monsanto* holds that a manufacturer may have legitimate, indepen-

dent reasons for terminating a discounter in response to dealer complaints. One reason is to avoid losing the business of disgruntled dealers. This reason grows in importance as the volume of dealer complaints increases. A manufacturer is not prohibited from avoiding the potential loss of many of its dealers because it acted in response to price complaints. *Monsanto*, 465 U.S. at 764. Therefore, regardless of whether the complaints are mere expressions of dismay or constitute economic duress, coercion, and threats, the terminated distributor must still present additional evidence that the manufacturer and another distributor acted in concert to set or maintain prices. *See Monsanto*, 465 U.S. at 764.[3]

The Garment District also argues that *Monsanto* and *Raytheon* are distinguishable because they involved a different market structure. In both of those cases, the manufacturer's marketing strategy imposed nonprice restrictions on its distributors. The Garment District relies on the following discussion of these restrictions in *Monsanto*: "The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free-riders' do not interfere." 465 U.S. at 762-73. In these circumstances, "[a] manufacturer and its distributors have legitimate reasons to exchange informa-

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3. The Garment District relies on Marco Holding Co. v. Lear Siegler, Inc., 1985-1 Trade Cas. ¶ 66,446 (N.D. Ill. 1985), and The Jeanery, Inc. v. James Jeans, Inc., 1984-2 Trade Cas. ¶ 66,278 (D. Ore. 1984), for the proposition that termination in response to dealer threats is sufficient to create an inference of conspiracy. However, the threats in those cases are comparable to the threats made in *Raytheon*. To the extent that these cases conflict, we adhere to our decision in *Raytheon*. For the same reason, we decline to follow Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979), a pre-*Monsanto* decision. The Garment District's reliance on Terry's Floor Fashions, Inc. v. Burlington Industries, Inc., 763 F.2d 604 (4th Cir. 1985), is also misplaced. In *Terry's*, this court affirmed summary judgment for the defendants where there were "at most two complaints by a single distributor." 763 F.2d at 615. *Terry's* simply does not address, either directly or by implication, the present situation where a dealer has applied economic duress, coercion, and threats.

tion about . . . prices" and to terminate discounters who are able to undersell distributors who must bear the costly nonprice restrictions. 465 U.S. at 762. The Garment District proved that similar nonprice restrictions do not exist in the retail clothing industry. Therefore, the Garment District contends that Belk had no legitimate reason to complain about its discount operations.

The market structure in *Monsanto* and *Raytheon*, and the problem of free-riders, explain why distributors were being undersold and hence why they complained. However, the critical element in the *Monsanto* analysis is not what motivates the distributors to complain, but rather what motivates the manufacturer to terminate discounters in response to these complaints. Here, as in *Raytheon*, the manufacturer sought to retain many dealers by sacrificing one. It acted without exacting an agreement from the remaining dealers to maintain prices.

The Garment District also seeks to distinguish *Monsanto* and *Raytheon* on the ground that most clothing stores sell their clothes at keystone prices. Because many retailers adhere to a uniform price, the Garment District asserts that it "did not need to prove that *Jantzen* attempted to fix a particular price. The theory of the plaintiff's case was that the *Belk defendants* procured the termination of The Garment District for the purpose of avoiding price competition." The Garment District asserts that Belk's coercion resulted in reverse price fixing in which the retailer's buying power was used to engage the manufacturer in concerted action to preserve the retailer's keystone price. It argues that although the initiative for maintaining the price flowed from the retailer to the manufacturer, which is the reverse of the ordinary situation, the termination of the Garment District was nonetheless a *per se* violation of the Sherman Act.

Section 1 of the Sherman Act does not proscribe independent action. *Monsanto*, 465 U.S. at 761. Therefore, it is insufficient merely to show that Belk sought to restrain competition, or that Jantzen's decision to terminate the Garment District harmed competition. Instead, the Garment District

must present evidence "that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." 465 U.S. at 768. *Monsanto* emphasizes that a manufacturer may have legitimate, independent reasons for terminating a discounter in response to dealer complaints, notwithstanding the harm to competition that results. Therefore, the fact that other retailers independently adhere to keystone pricing does not relieve the Garment District of its obligation of showing that Jantzen acted in concert to set or maintain retail prices.

The Garment District contends that even if *Monsanto* and *Raytheon* govern this case, it presented sufficient evidence for the jury to find concerted action. It emphasizes that Jantzen's assertion that the Garment District was terminated because of its poor image was a pretext. The Garment District contends that evidence that a manufacturer's stated reasons for terminating a distributor are pretextual is sufficient to create an inference of conspiracy.

The Garment District relies on Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469 (3d Cir. 1985). In *Fragale*, wholesalers refused to supply a new beer distributor, allegedly because of his inexperience and because there was insufficient demand to justify an additional distributor. The court noted that the distributor "challenged each reason offered by [the defendants] for refusing to deal . . . . This evidence of pretext, if believed by a jury, would disprove the likelihood of independent action on the part of [the defendants]." 766 F.2d at 474. Accordingly, the court held that the distributor had satisfied *Monsanto*'s requirement that there be additional evidence of a conspiracy.

We believe that *Fragale* is distinguishable. There was no allegation in *Fragale* that competing distributors threatened to stop buying from the defendants if they supplied the new distributor. Therefore, the defendants were not placed in the position of having to choose which distributor's business to relinquish. By contrast, Jantzen was forced to choose between the Garment District and Belk. It chose Belk, which was a larger customer. Therefore, even if Jantzen's concerns about

the Garment District's image was pretextual, it still had a legitimate, independent reason to terminate their relationship. The Court has stated that conduct that is as "consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 106 S. Ct. at 1357.

The Garment District also contends that the following evidence meets the *Monsanto* standard: Belk Stores Services excluded Jantzen from its trade show and Mathews-Belk placed Jantzen's goods in its budget basement in reprisal for Jantzen's decision to sell to the Garment District; Jantzen notified Belk in writing of its decision to terminate the Garment District; and a Belk officer attempted to destroy all copies of Jantzen's letter because of its detrimental effect on future litigation.

We do not agree that this evidence is sufficient. The decisions to exclude Jantzen from Belk's trade show and to place Jantzen's goods in the budget basement are comparable to Belk's threats to stop doing business with Jantzen. They were measures to exert pressure on Jantzen. Jantzen's letter simply acknowledges its decision to terminate the Garment District. In *Raytheon*, we noted that "[a]nother dealer testified that [a Raytheon official] admitted to him that Raytheon had terminated National because of the adverse dealer reaction . . . ." 778 F.2d at 192. The fact that Jantzen communicated its decision in writing instead of orally is of no consequence. The attempt to destroy the letter reflects Belk's concern about the lawfulness of its conduct, but this act, which cannot be condoned, is insufficient to permit an inference of concerted action to maintain prices.

V

The Garment District failed to present evidence of an agreement between Jantzen and Belk to set, control, fix, stabilize, or maintain prices. *Monsanto* establishes that Belk's complaints about the Garment District's discount prices and Jantzen's termination of the Garment District in response to these complaints are insufficient to permit the inference that Belk and Jantzen entered into such an agreement. *Raytheon* establishes that complaints that rise to the level of threats do not alter the standard of proof prescribed by *Monsanto*. Therefore, Jantzen, acting independently, could announce its suggested retail price and terminate the Garment District, which sold at a discount, without violating section 1 of the Sherman Act. *Monsanto*, 465 U.S. at 761; *Colgate*, 250 U.S. at 307.

AFFIRMED.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-84-543-P

THE GARMENT DISTRICT, INC.,

Plaintiff,

—v.—

BELK STORES SERVICES, INC., MATTHEWS-BELK COMPANY, and JANTZEN, INC.,

Defendants.

MEMORANDUM OF DECISION AND ORDER

THIS MATTER came on to be heard before the undersigned judge and a jury on September 11, 1985 at Charlotte, North Carolina.

The Plaintiff was represented by Herbert Kassner and Stacey Haigney, Attorneys at Law, and C. Michael Wilson, Attorney at Law. The Defendant Jantzen was represented by A. Ward McKeithen, Attorney at Law, and the Belk Defendants were represented by E. Osborne Ayscue, Jr. and Ben Hudson, Attorneys at Law. At the close of the Plaintiff's evidence all the Defendants moved for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, which was granted in open court.

If an antitrust plaintiff does not present sufficient evidence of his case in chief, a district court has a duty to direct a verdict in favor of the defendant. *Roesch, Inc. v. Star Coller Corp.*, 671 F.2d 1168 (8th Cir. 1982).

As stated in the Plaintiff's trial brief, "the essence of the Garment District's claim is under Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1)" which reads as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal.

In order for the plaintiff to survive a motion for directed verdict, the plaintiff's evidence when considered in the light most favorable to the plaintiff must demonstrate: (1) that the Defendants contracted, combined or conspired among each other, (2) that the combination or conspiracy produced adverse anti-competitive effects within the relevant product and geographic markets, (3) that the objects of and conduct pursuant to the conspiracy were illegal, and (4) that the Plaintiff was injured as a proximate result of the conspiracy. *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195-96 (6th Cir. 1982).

Now, turning to the first element, "conspiracy," the Plaintiff contends that there was a conspiracy "between the defendant Belk Stores Buying Services, Inc. and Matthews Belk (hereinafter jointly referred to as "Belk") on the one hand and Jantzen on the other to refrain from selling Jantzen merchandise to plaintiff from early 1981 to the present because the plaintiff was a discounter and that the loss of Jantzen merchandise by the Garment District was, 'in purpose and effect,' a coerced price fixing agreement in *per se* violation of Section 1 of the Sherman Act."

The Plaintiff's evidence in the light most favorable to the Plaintiff was that Belk's told Jantzen representatives that if Jantzen continued to supply the Plaintiff that Belk's would terminate its business with Jantzen. The Plaintiff produced no evidence that there was any agreement or "conspiracy" between Jantzen and Belk to maintain resale prices. A conspiracy to maintain resale prices simply was not established by proof that the Defendant manufacturer terminated the Plaintiff following or even in response to, complaints or threats by the

Defendant Belk. Independent action by a manufacturer and concerted action on non price restrictions must be distinguished from price fixing agreements. On a claim of concerted price fixing, the antitrust plaintiff must present evidence to carry the burden of proving there was such an agreement. *Monsanto Co. v. Spray-Rite Service Corp.*, 79 L.Ed 2d 775 (1984). This the Plaintiff has failed to do.

The Plaintiff has produced absolutely no evidence of any agreement between the Defendants Jantzen and Belk with reference to fixing prices. On the contrary, the only evidence is that all retailers of Jantzen goods, including Belk and the Plaintiff, set their prices with no interference from the Defendant Jantzen. Thus, the Plaintiff has failed to satify the first element that there was a conspiracy to fix prices because Jantzen refused to sell to the Plaintiff.

If the evidence considered in the light most favorable to the Plaintiff showed that Jantzen terminated the Plaintiff as a result of Belk's Complaint and the statement that Belks would terminate its business with Jantzen if Jantzen continued to do business with the Plaintiff, the next question is whether that action had an anti-competitive effect within the relevant product and geographic market.

The answer is clearly "no." Limiting the number of distributors, or even eliminating existing ones to make the remaining ones sale outlets for a region, is conduct judged under the rule of reason. The evidence showed with few exceptions that Jantzen products were sold only in department and specialty stores, and that Jantzen did not sell its products to self-service operations of the kind operated by Plaintiff. Horizontal restraints serve to stifle competition. However, vertical intrabrand refusals to deal, on the other hand, may limit *intra*brand competition, but at the same time promote *inter*brand competition. Limiting intrabrand competition may have a positive effect on interbrand competition in the sportswear field. *Terry's Floor Fashions v. Burlington Industries*, 763 F.2d 604 (4th Cir. 1985) (Winter, C.J., concurring). The only brand the Plaintiff could not handle because of the alleged concerted action of the Defendants was Jantzen. To paraphrase Justice Holmes in his dissenting opinion in *Dr. Miles Medical Co. v.*

John D. Park, 220 U.S. 373 (1911): There may be necessaries that sooner or later must be dealt with, like short rations in a shipwreck, but Jantzen sportswear is not one of them. The Country, the economy and Gaston County, North Carolina could survive without Jantzen. In any event, the evidence was that at least one other store in Gastonia, Iveys, sold Jantzen products.

Now, turning to the third element that the objects of the alleged conduct of the Defendants were illegal, there is no evidence that the Defendants engaged in any conspiracy to fix prices. Considering the evidence in the light most favorable to the Plaintiff that the Plaintiff was terminated by the Defendant Jantzen as a result of complaints by Defendant Belk, that conduct is not illegal. Permitting an *agreement* to be inferred merely from the existence of complaints or from the fact that termination came about in response to complaints could deter or penalize perfectly legitimate conduct. *Monsanto*, *supra* at 785.

Finally, in order to prevail, the Plaintiff must demonstrate that it was injured as a proximate result of the conspiracy.

The statute, 15 U.S.C. Section 15, which gives the private litigant the right to sue, imposes the basic requirement that there be injury to Plaintiff's business or property. It has, therefore, been held repeatedly that the gist of the action is legal injury, not mere violation of the statute. The damages for which recovery may be had in a civil action must be proximately related to the conspiracy; recovery for the violation is not based on the conspiracy itself but on injury to the Plaintiff produced by specific overt acts pursuant to the conspiracy. The mere existence of a violation is not sufficient *ipso facto* to support the action; a private person has no right to complain of a violation of Section 1, nor does such a violation *per se* give a private cause of action. *See Winkler & Smith Citrus Products Co. v. Sunkist Growers, Inc.*, 346 F.2d 1012, n.1 (9th Cir. 1965).

The Plaintiff did not offer in evidence any financial statements to substantiate its claim of damages. On cross-examination of Plaintiff's witnesses, however, it was demonstrated that the Plaintiff had a loss from operations from its inception in

August 1981 until it closed in 1983. (The Plaintiff did have a profit for the period ending January 31, 1982 primarily because of interest earnings.)

There was no credible evidence from the Plaintiff that it had suffered any financial loss as a result of the Defendant Jantzen's termination of sales to the Plaintiff in 1982.

Cross-examination of the Plaintiff's witnesses revealed that there had been six to eight thousand dollars misappropriated; that the Plaintiff's accountant had called the Plaintiff's attention to numerous poor business and accounting practices; that there had been approximately $100,000 shrinkage in inventory during the operation of the business; that Jay Crippen, a majority shareholder in the Plaintiff corporation, was also majority shareholder in another store in Knoxville, Tennessee (which is also in bankruptcy); that merchandise had been shipped from the Plaintiff to the Knoxville store; and that there were numerous other defalcations on the part of the management of the Plaintiff. All of this evidence leads to the inevitable conclusion that the Plaintiff's survival was doomed from the start by the failure of its management and not because it did not receive Jantzen merchandise from Jantzen after 1982.

In short, the Plaintiff did not show that it suffered any damage because of Defendant Jantzen's refusal to sell to it. Any projection of damages on this evidence would be pure speculation and guesswork, which would not support an antitrust judgment for the Plaintiff.

In conclusion, the Plaintiff has not produced evidence which would support a verdict that the Defendants had violated Section 1 of the Sherman Act.

The Defendants' motion for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure is GRANTED.

This the 18th day of September, 1985.

/s/ ROBERT D. POTTER
Robert D. Potter, *Chief*
United States District Judge

APPENDIX C

UNITED STATES DISTICT COURT
WESTERN DISTIRCT OF NORTH CAROLINA

Case Number: C-C-84-0543-P

THE GARMENT DISTRICT, INC.,

—v.—

BELK STORES SERVICES, INC., MATTHEWS-BELK COMPANY & JANTZEN INC.

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The plaintiff has not produced evidence which would support a verdict that the defendants had violated Section 1 of the Sherman Act. The defendants' motion for a directed verdict pursuant to Rule 50 (a) of the Federal Rules of Civil Procedure is Granted.

September 18, 1985	THOMAS J. MCGRAW
Date	*Clerk*
	/s/ CINDY GIPSON
	(By) Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2362

THE GARMENT DISTRICT, INC.,

Appellant,

—v.—

BELK STORES SERVICES, INC,; MATTHEWS-BELK COMPANY; JANTZEN, INC.,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN M. GREACEN
John M. Greacen

Entered August 26, 1986